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Supreme Court, U.S.
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No. 10-301

IN THE

Supreme Court of the United States

ANASCAPE, LTD.,

Petitioner,

v.

NINTENDO OF AMERICA INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals reviewing a denial of a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure may determine that expert testimony, like any other testimony, does not provide substantial evidence supporting a jury verdict.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Nintendo of America Inc. states that its parent corporation is Nintendo Company, Ltd. The stock of Nintendo Company, Ltd. is publicly traded in Japan.

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BRIEF IN OPPOSITION

INTRODUCTION

"When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group Ltd.* v. *Broum & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993). In this case, the Federal Circuit concluded that indisputable record facts—the specifications of the two patents at issue—did not permit a reasonable jury to rule in favor of Anascape and accordingly directed judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. Anascape asserts error based solely on the

fact that Anascape's expert gave conclusory testimony that, on its face, matched Anascape's litigation position—even though the Federal Circuit ruled that the testimony was "not supported by any evidence at all, and cannot override the objective content of" the patent documents. Pet. App. 14.

Anascape's vaunted "circuit split" is in fact a phantom. Anascape did not mention any split in its petition for rehearing below, and it identifies no decision acknowledging any disagreement regarding the application of Rule 50. Numerous decisions in the very circuits Anascape identifies grant summary judgment or judgment as a matter of law in the face of expert testimony that, while admissible under Federal Rule of Evidence 702, is insufficient to support a jury verdict. The cases Anascape cites are distinguishable and, moreover, do not purport to differ from the approach of any other circuit, let alone from this Court's approach in *Brooke Group*. The fact that expert testimony satisfies the threshold requirements for admissibility under Federal Rule of Evidence 702 is not a reason to exempt it from the ordinary operation of Rule 50. The Federal Circuit's decision is nothing but a factbound—and correct—application of settled Rule 50 doctrine to the particular evidentiary record in this case.

STATEMENT

A. Factual Background

Nintendo is a leading manufacturer of video game systems, including video game controllers. Anascape, a company that makes no products and does not compete in the video game market, sued Nintendo for patent infringement in the U.S. District Court for the Eastern District of Texas, accusing game controllers for two of

Nintendo's innovative video game systems, the GameCube and the Wii.

A video game controller operates by converting "the movement of the user's hand or finger into an electrical impulse that controls the image on a display, such as a screen." Pet. App. 25. Controllers typically employ one or more "input members," such as a joystick, handle, trackball, buttons, or other elements that permit the controller to sense the user's hand actions, which are in turn translated electronically into linear and rotational movements on the screen. *Id.* at 2-3. Hand inputs can move images in any of six "degrees of freedom" (DOF): along three linear axes (forward/backward, left/right, or up/down) and around three rotational axes (roll, pitch, or yaw). *Id.* at 3.

Two U.S. patents are relevant here. U.S. Patent No. 6,222,525, which issued from an application filed on July 5, 1996 (the '525 patent), was filed by Anascape's founder, Brad Armstrong. In an order Anascape did not appeal, the district court construed the asserted claims of the '525 patent in a way that precluded a finding of infringement. Pet. App. 18 & n.3. Accordingly, the parties stipulated that the accused Nintendo controllers do not infringe the '525 patent. *Id.*

The second patent at issue resulted from an application filed after Mr. Armstrong founded Anascape, a company formed to license, enforce, or otherwise monetize Mr. Armstrong's patents and patent applications. C.A.J.A. 4372, 6315. In August 2000, after searching for information about Nintendo's forthcoming GameCube product, Mr. Armstrong learned that the GameCube controller would have multiple input members—two joysticks and a four-pointed "cross

switch"—none of which would be movable in all six DOF. *Id.* at 8713-8716.

On November 16, 2000, Mr. Armstrong filed a "continuation-in-part" application of the '525 patent; the application eventually issued as U.S. Patent No. 6,906,700 (the '700 patent).[1] The '700 patent claimed controllers with multiple input members that together operate in six degrees of freedom. Pet. App. 5. As construed by the district court, the asserted claims of the '700 patent were not limited to a single input member operable in six degrees of freedom. *Id.* at 4; C.A.J.A. 44-50.

Anascape conceded below that controllers with multiple input members were sold or otherwise known in the art prior to the filing of the '700 patent, including a Sony controller sold in 1998, a patent application published in 1998, and a second Sony controller sold in October 2000. Pet. App. 4; *see* 35 U.S.C. § 102(a), (g)(2). Anascape also conceded that the prior art invalidated the '700 patent claims unless the claims were entitled to the '525 patent's earlier priority date of July 5, 1996. Pet. App. 4.

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[1] Mr. Armstrong later improperly changed the application's designation to a "continuation" application. In a continuation application, "the disclosure presented in the continuation must be the same as that of the original application." *Manual of Patent Examining and Procedure* § 201.07 (8th rev. ed. 2010). A continuation-in-part, by contrast, may include new matter not contained in the parent application, but claims to that new matter will not be entitled to the earlier filing date. *Id.* § 201.11; *PowerOasis, Inc.* v. *T-Mobile USA, Inc.*, 522 F.3d 1299, 1306 (Fed. Cir. 2008). As is discussed below, the disclosure of the '700 patent differed significantly from that of the '525 patent, so its proper designation was as a continuation-in-part. Pet. App. 11 & n.2.

In order for a patent application to be entitled to the priority date of an earlier application, the earlier application, as originally filed, must contain a written description of the invention that supports the claims of the later application "'in sufficient detail that one skilled in the art can clearly conclude that the inventor invented the claimed invention as of the filing date sought.'" Pet. App. 4 (quoting *Lockwood* v. *American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997)); *see also* 35 U.S.C. § 120. In this case, the question of priority turned on whether the '525 patent sufficiently described the "full scope of the inventions recited in each asserted claim of the '700 patent." Pet. App. 4-5, 29.

All of the claims in the '525 patent as originally filed recite a single input member, not multiple input members. Pet. App. 5. As Nintendo pointed out below—and Anascape's petition for certiorari does not deny—the '525 specification contains "over twenty explicit statements that the invention is directed to a single input member that is operable in six degrees of freedom." *Id.* at 8. The '525 patent's drawings "all show a single input member ... capable of operating in six degrees of freedom." *Id.* at 7. The '525 patent also disparaged a prior patent with multiple input members (U.S. Patent No. 5,298,919 to Chang), stating that "the lack of a hand operable single input member operable in six degrees of freedom has many significant disadvantages." *Id.* at 9 (quoting '525 patent, col. 3, l. 30 to col. 4, l. 30).

In preparing the application for the '700 patent, Mr. Armstrong removed important disclaimers and limitations from the '525 patent and added significant broadening language. Every occurrence of the phrase "hand operable single input member" was replaced with "hand operable input member(s)," and 16 of 17 references to "single input member" were changed to "at

least one input member." Pet. App. 11-12. Mr. Armstrong also deleted the '525 patent's criticism of the Chang patent and its use of multiple input members. *Id.* at 12.

B. Proceedings In The District Court

In a pretrial claim construction order, the U.S. District Court for the Eastern District of Texas recognized that the inventor of the '525 patent "clearly expected the inventions to be used with a *single input member* (such as a joystick) that moved in 6 DOF to control an image appearing to move in three dimensions." Pet. App. 5 (quoting 2008 WL 160546, at *3) (emphasis added). Nonetheless, Anascape argued that the '525 patent sufficiently described the devices with multiple input members later claimed in the '700 patent.

Anascape based its argument on the testimony of its expert witness, Dr. Robert Howe. At trial, Dr. Howe testified that a statement in the '525 patent that "[t]he input member of the joystick-type controller may be manipulable or operable in *up to* 6 degrees of freedom" meant that "it could be less" than six degrees. Pet. App. 57-58. He also testified that Figure 9 of the '525 patent showed "a lot of different input modes." *Id.* at 59. Dr. Howe also referred to other "words" and "text" in the '525 patent that, he contended, meant that "you could interpret or sense the motion on all 6 degrees of freedom there, but you don't have to." *Id.* at 61-62. Dr. Howe's overall conclusion was that the '525 patent "talks about many ideas," that "the material in the patent is broader than a single input 6-degree-of-freedom device," and that "this supports the claims ... from the '700 patent." *Id.* at 54-55.

Dr. Howe's direct testimony did not address the multiple instances of broadening language and deletions of limitations that differentiate the disclosure of the '700 patent from that of the '525 patent. And he admitted on cross-examination that he did not address the '525 patent's disparagement of the Chang reference, which employed multiple input members. *See* C.A.J.A. 4693. Dr. Howe also admitted that the '525 patent does not disclose the feature—claimed in the '700 patent—of combining three or more input members to achieve control in six DOF:

> Q. Just to confirm, though, you can't point to anything in the 1996 application where there's three input members that can each be touched by the user and each be moved bi-directionally to provide 6 degrees of freedom, can you?
>
> A. No.

Id.

At the close of Anascape's case, Nintendo moved for judgment as a matter of law under Rule 50, contending that there was "no legally sufficient evidentiary basis for a reasonable jury to find for Anascape on the issue of priority/earlier effective filing date." Def. Nintendo of Am.'s Mot. for Judgment as a Matter of Law 9 (Dkt. 316) (May 9, 2008).

At the close of all evidence, Nintendo renewed its Rule 50 motion, pointing out in detail that every embodiment disclosed in the '525 patent involved a single input member movable in six DOF, that the '525 patent disparaged the Chang reference for its use of multiple input members, and that no reasonable jury could find that the '525 patent supported the claims of the '700 patent. Def. Nintendo of Am.'s Mot. for Judgment as a

Matter of Law 9-12 (Dkt. 317) (May 13, 2008). The district court denied the motion, ruling that Dr. Howe's testimony was "sufficient evidence for this to go to a jury." Trial Tr. 1523-1524 (May 13, 2008).

The jury found that three of Nintendo's four accused controllers infringed the '700 patent and awarded $21 million in damages. Pet. App. 26. Nintendo renewed its motion for judgment as a matter of law and, in the alternative, sought a new trial. Among other arguments, Nintendo pointed out Dr. Howe's admission that the '525 patent failed to support the full breadth of the '700 patent claims. *See* Def. Nintendo of Am.'s Renewed Mot. for Judgment as a Matter of Law or, in the Alternative, a New Trial 9 (Dkt. 356) (July 2, 2008). The district court denied the motion, ruling that Dr. Howe had "provided extensive testimony" about how the '525 patent specification supported the asserted claims in the '700 patent. Pet. App. 29-30.[2]

C. Proceedings In The Court Of Appeals

The U.S. Court of Appeals for the Federal Circuit reversed, concluding that "a reasonable jury would not have a legally sufficient evidentiary basis to find" that the '525 patent sufficiently described the invention claimed in the '700 patent. Pet. App. 19 (internal quotation marks omitted).

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[2] The district court also ruled that testimony of Nintendo engineer Kazunori Koshiishi supported the jury's verdict. Pet. App. 30-31. The Federal Circuit ruled that Anascape's argument in this regard rested on "a misstatement of Mr. Koshiishi's testimony." Pet. App. 15. Anascape does not challenge that ruling in its petition for certiorari. Dr. Howe's testimony rested in part on Anascape's misapprehension of Mr. Koshiishi's testimony. C.A.J.A. 4684.

The Federal Circuit carefully analyzed the objective evidence of record. First, the court noted the numerous instances in which the '525 patent described the invention as a device with a "single input member" movable in six DOF. Pet. App. 6. The court also rejected Anascape's argument based on the figures in the '525 patent, because the specification itself and the inventor's testimony confirmed that each of the figures showed a single input member operating in 6 DOF. *Id.* at 7-8. Similarly, the court observed that the sentence in the '525 patent stating that a joystick "may be" operable in 6 DOF—on which Dr. Howe relied at trial—"is not a description of the '525 invention; it is a description of prior art joysticks as generally used in video games." *Id.* at 8. The Federal Circuit separately noted the '525 patent's disparagement of the Chang reference for its use of multiple input controllers. *Id.* at 8-9. The Federal Circuit also rejected Anascape's efforts to rely on material in the '525 specification that was added in August 2000, long after the original application was filed. *Id.* at 10 (citing *PowerOasis, Inc.* v. *T-Mobile USA, Inc.*, 522 F.3d 1299, 1306 (Fed. Cir. 2008)).

The Federal Circuit then itemized the numerous ways in which Mr. Armstrong had modified the '525 specification in preparing the later application that became the '700 patent. Pet. App. 11-12. Mr. Armstrong replaced references to a "single input member" with references to "at least one input member" and "deleted all mention of the prior art Chang controller and its deficiencies." *Id.* at 12. These changes were "extensive and substantive" and gave the '700 patent "commensurately broadened scope." *Id.* at 13.

The Federal Circuit found Anascape's argument that the '525 patent "did not *disclaim* the broader scope of the '700 claims" to be off-point, because "the question

is whether the '525 specification *sufficiently describes* the later-claimed subject matter." Pet. App. 13 (emphasis added). As the court noted, a patentee is not "presumed to support variants that are not described." *Id.* at 14.

The Federal Circuit then ruled that Dr. Howe's evidence "cannot override the objective content of these documents," namely the '525 and '700 patents, noting that his conclusion that the '525 patent supported the '700 patent claims was "not supported by any evidence at all." Pet. App. 14. The court concluded that "the only reasonable reading of the '525 specification is that it is directed to and describes *only* a controller having a single input member operable in six degrees of freedom." *Id.* at 17. As a result, the '700 patent claims were not entitled to an earlier priority date and—by Anascape's concession—were invalidated by prior art. The Court ruled that "judgment as a matter of law is appropriate" and reversed the district court's denial of Nintendo's Rule 50 motion. *Id.* at 19.[3]

Anascape petitioned for panel rehearing and rehearing en banc. Anascape's request for panel rehearing asserted that the panel had "declined to consider Dr. Howe's analysis" and argued that the panel should have "deferr[ed] to record expert evidence." Pet. for Reh'g 6. Anascape urged the panel to rehear the case to consider the expert evidence under the standard "required by the law of the regional circuit (here, the Fifth Circuit)." *Id.* at 7. Anascape did not suggest that the Fifth Circuit's approach to the treatment of expert tes-

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[3] Judge Gajarsa filed a separate concurrence that does not bear on the issue presented in Anascape's petition for certiorari. Pet. App. 20-23.

timony on a Rule 50 motion was incorrect, nor did it suggest that the Fifth Circuit's approach conflicted with that of other circuits. Anascape's petition did not seek a remand for a new trial or indicate that it could have proffered any additional evidence to avoid judgment as a matter of law.[4]

The Federal Circuit denied rehearing and rehearing en banc. Anascape petitioned for certiorari.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS REPEATEDLY RECOGNIZED THAT ADMITTED EXPERT TESTIMONY MAY BE INSUFFICIENT TO SUPPORT A VERDICT

This Court has engaged in the very reasoning for which Anascape faults the Federal Circuit here. In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a jury had found that respondent Brown & Williamson "had engaged in price discrimination that had a reasonable possibility of injuring competition in the domestic cigarette market as a whole." *Id.* at 218. The Court acknowledged that petitioner Liggett had proffered an economic expert who "explained Liggett's theory of predatory price discrimination and testified that he believed it created a reasonable possibility that Brown & Williamson could injure competition in the United States cigarette market as a whole." *Id.* at 242. The Court nonetheless affirmed the grant of judgment as a matter of law, ruling

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[4] Anascape also sought rehearing en banc on the theory that the panel's decision conflicted with the Federal Circuit's decisions in *Ariad Pharmaceuticals, Inc.* v. *Eli Lilly & Co.*, 598 F.3d 1336 (Fed. Cir. 2010) (en banc), and *Sundance, Inc.* v. *DeMonte Fabricating Ltd.*, 550 F.3d 1356 (Fed. Cir. 2008).

that the record "does not provide an adequate basis for a finding of liability." *Id.* at 230. The Court explained the insufficiency of the expert testimony as follows:

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.

Id. at 242 (citation omitted).

In support, the Court cited and reaffirmed similar reasoning in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). There, the Court accepted as final a determination that the plaintiffs' expert evidence was admissible. *Id.* at 580. Nonetheless, the Court affirmed the district court's conclusion that the report was "implausible and inconsistent with record evidence," had "little probative value," and accordingly could not overcome summary judgment. *Id.* at 594 n.19 (cited in *Brooke Group*, 509 U.S. at 242).

Furthermore, in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)—decided only a week after *Brooke Group*—this Court took pains to emphasize the difference between a determination that expert testimony is admissible and a determination that it suffices to support a reasonable jury verdict. Responding to the concern that *Daubert*'s more permissive approach to admission of expert evidence might "result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions," this Court reaffirmed the authority of federal courts to resolve cases as a matter of law under

Rule 50, even in the face of admissible expert testimony:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a), and likewise to grant summary judgment, Fed.Rule Civ.Proc. 56.

Daubert, 509 U.S. at 595-596. The Court cited with approval two cases that had ruled, as a matter of law, that admitted expert testimony was insufficient to support a jury verdict. *See id.* at 596 (citing *Turpin* v. *Merrell Dow Pharms., Inc.*, 959 F.2d 1349 (6th Cir. 1992), and *Brock* v. *Merrell Dow Pharms., Inc.*, 874 F.2d 307 (5th Cir. 1989)).[5]

The Federal Circuit's analysis of Dr. Howe's testimony was no different from this Court's analysis of similar testimony in *Brooke Group* and *Matsushita*. Just as this Court rejected expert testimony that had "little probative value in comparison with the economic

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[5] Although the Sixth Circuit's decision in *Turpin* ruled in the alternative that expert testimony was inadmissible (*see* 959 F.2d at 1360), its primary conclusion was one of insufficiency of the evidence. *See id.* at 1350 ("Taken in the light most favorable to the plaintiffs, the scientific evidence that provides the foundation for the expert opinion on causation in this case is not sufficient to allow a jury to find that it is more probable than not that Bendectin caused the minor plaintiff's injury."); *see also Daubert*, 509 U.S. at 596 (summarizing *Turpin* as "holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury").

factors" in the record, *Matsushita*, 475 U.S. at 594 n.19; *see also Brooke Group*, 509 U.S. at 243, the Federal Circuit rejected expert testimony that sought to "override the objective content of" the two patent specifications at issue (Pet. App. 14). The Federal Circuit did not make any credibility determinations or weigh the evidence, any more than this Court had; rather, it simply concluded under accepted Rule 50 standards that Dr. Howe's opinion was incapable of supporting a jury verdict. Anascape's contrary account of the Federal Circuit's opinion is indistinguishable from the position that Justice White expressed in dissent—a position that this Court rejected in *Matsushita* and again in *Brooke Group*. *See Matsushita*, 475 U.S. at 606 (White, J., dissenting) (contending that the weaknesses in plaintiffs' expert's analysis were "arguments that a factfinder should consider").

II. THERE IS NO CIRCUIT SPLIT

In its petition for rehearing below, Anascape accused the Federal Circuit of *misapplying* the rulings of the Fifth Circuit, which is the regional circuit governing non-patent issues in this patent case. Pet. for Reh'g 7; *see Gemtron Corp.* v. *Saint-Gobain Corp.*, 572 F.3d 1371, 1379 (Fed. Cir. 2009) (Federal Circuit reviews denials of Rule 50 motions under the law of the regional circuit), *cert. denied*, 130 S. Ct. 1739 (2010). Reversing course, Anascape now contends that the Federal Circuit *correctly* applied Fifth Circuit law, but that the Federal and Fifth Circuits' approach to Rule 50 presents a "sharp contrast" to that of other circuits, implicating a "longstanding and entrenched" circuit conflict. Pet. 12, 16. Anascape did not identify any such conflict in its petition for rehearing below, and for good reason: none exists.

Anascape identifies no court of appeals decision acknowledging its perceived circuit split. On the contrary, numerous courts of appeals, including those circuits Anascape invokes, have followed this Court's analysis in *Matsushita* and *Brooke Group* by directing summary judgment or judgment as a matter of law notwithstanding expert testimony that, though admissible, is deemed insufficient to support a jury verdict. *See, e.g.*, *Waterman* v. *Batton*, 393 F.3d 471, 478 & n.8 (4th Cir. 2005) (reversing denial of summary judgment where the record showed that officers' conduct was reasonable, notwithstanding expert testimony to the contrary); *Bailey* v. *Allgas, Inc.*, 284 F.3d 1237, 1257 (11th Cir. 2002) ("Regardless of whether the testimony of the Baileys' expert is admissible, we conclude the testimony is insufficient to establish a violation of the Robinson-Patman Act."); *Virgin Atl. Airways Ltd.* v. *British Airways Plc*, 257 F.3d 256, 267-268 (2d Cir. 2001) (affirming grant of summary judgment notwithstanding expert testimony, citing *Brooke Group*); *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("Because there is no evidence in the record establishing that Cargill's market share was constant between 1993 and 1995, any inference founded upon that factual assertion—even one drawn by an economic expert—is necessarily unreasonable." (citing *Brooke Group*) (footnote omitted)); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999) (affirming summary judgment where expert opinion, even "assuming [its] admissibility," offered "meager evidence of defendants' behavior contrary to self interest and of motivation to conspire"); *United States* v. *City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997) (directing dissolution of consent decree where city's expert testimony "lacked probative value as a matter of law"); *Rebel Oil Co.* v. *At-*

lantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) ("Our independent review of Rebel's expert affidavits compels the conclusion that it would be unreasonable for a juror to infer from those affidavits that full-serve sales of gasoline should be excluded from the relevant market."); *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 969 (10th Cir. 1994) (reversing denial of Rule 50 motion where "the evidence cited by the district court" in support of the jury verdict, including expert testimony, "is insufficient as a matter of law"); *Vollrath Co.* v. *Sammi Corp.*, 9 F.3d 1455, 1462 (9th Cir. 1993) (affirming grant of judgment notwithstanding the verdict where plaintiff's "expert testimony was not based upon sufficient evidence adduced at trial"); *Alevromagiros* v. *Hechinger Co.*, 993 F.2d 417, 422 (4th Cir. 1993) (affirming directed verdict where expert testimony was "unsupported by any evidence"); *Calhoun* v. *Honda Motor Co.*, 738 F.2d 126, 131 (6th Cir. 1984) (affirming grant of judgment notwithstanding the verdict where "[a]lthough plaintiff's expert opined that the brakes were wet at the time of the accident, the evidence does not support his conclusion"); *Washington* v. *United States*, 214 F.2d 33, 43 (9th Cir. 1954) (affirming directed verdict, ruling that opinion testimony, including expert opinion, "without any support in the demonstration and physical facts, is not substantial evidence"); *see also Guinn* v. *AstraZeneca Pharms. LP*, 602 F.3d 1245, 1256-1257 (11th Cir. 2010) (affirming summary judgment where, even if expert testimony had been admissible, it would not have permitted a reasonable juror to rule in plaintiff's favor); *Pace* v. *Capobianco*, 283 F.3d 1275, 1281 n.1 (11th Cir. 2002) ("Opinions, be they expert or lay, are only as good as the evidence upon which they are based.").

The decisions Anascape cites do not suggest any meaningful disagreement either. *Kinser* v. *Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), was abrogated by this Court's decision in *Weisgram* v. *Marley Co.*, 528 U.S. 440 (2000), which ruled (contrary to *Kinser*) that an appellate court may direct judgment for a verdict loser in a case where "the appellate court declares inadmissible record evidence essential to the verdict winner's case." *Id.* at 454. And even if *Kinser* were good law, it would be inapposite here, since the Federal Circuit did not rule Dr. Howe's testimony inadmissible; it simply ruled that the record, *including* his testimony, was insufficient to permit a verdict for Anascape.

Questar Pipeline Co. v. *Grynberg*, 201 F.3d 1277 (10th Cir. 2000), ruled only that the district court had incorrectly *stricken* certain evidence. *Id.* at 1290. It is not even clear that the evidence at issue in *Grynberg* was expert testimony. *See id.* at 1289 (observing no indication "that Mr. Grynberg was actually testifying as an expert").[6] And *Christopher* v. *Cutter Labs.*, 53 F.3d 1184 (11th Cir. 1995), ruled that the record as a whole, including expert testimony that was valid and admissible (though some other testimony was not), sufficed to support the verdict. *Id.* at 1192. Neither case suggested that expert testimony, once admitted, could *never* be deemed insufficient to sustain a verdict where it was "not supported by any evidence at all" and contrary to "the objective content" of the governing documents. Pet. App. 14.

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[6] Although the *Grynberg* plaintiff offered expert testimony as well, the Tenth Circuit ruled that it was "properly stricken." *Id.* at 1288.

Anascape also cites three cases in which appellants relied on *Daubert* itself to challenge the reliability of expert testimony on appeal, despite not having raised a *Daubert* challenge below. In the first two, *C.B. Fleet Co.* v. *SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430 (4th Cir. 1997), and *Marbled Murrelet* v. *Babbitt*, 83 F.3d 1060 (9th Cir. 1996)—both appeals following bench trials—the appellate challenge was expressly based on a failure of expert testimony "to meet the standard for reliable scientific evidence under *Daubert*," an argument the appellants had failed to preserve in the trial court. *Marbled Murrelet*, 83 F.3d at 1066; *see also C.B. Fleet*, 131 F.3d at 437. In the third case, *United States* v. *Gaskin*, 364 F.3d 438 (2d Cir. 2004), the appellant not only failed to raise *Daubert* at trial, but stipulated to the expert testimony. *Id.* at 460 & n.8. The courts of appeals refused to consider arguments based on the *Daubert* admissibility standard "in the guise of an insufficiency-of-the-evidence argument" where the issue had not been pressed before or passed on by the district court. *Marbled Murrelet*, 83 F.3d at 1067; *see also C.B. Fleet*, 131 F.3d at 437 (refusing to perform a "first instance application of *Daubert* principles on a record completely inadequate for the purpose"); *Gaskin*, 364 F.3d at 460 n.8. Here, by contrast, the Federal Circuit did not rule Dr. Howe's testimony inadmissible under *Daubert* principles; it simply held, in line with established Rule 50 jurisprudence, that the record as a whole could not reasonably support a verdict for Anascape—an argument that was both presented to and decided by the district court. Pet. App. 28-31.

Anascape's last case does not create a circuit split either. On the contrary, the Second Circuit reaffirmed that *Daubert* did not change settled Rule 50 doctrine,

but rather expressly contemplated the possibility of judgment as a matter of law notwithstanding expert testimony. *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1132-1133 (2d Cir. 1995) (noting that *Daubert*, *Turpin*, and *Brock* "did not alter the traditional sufficiency standard"). Although the Second Circuit did reverse the grant of a Rule 50 motion, it did so only by identifying eight serious deficiencies in the district court's analysis of the record, including reaching scientific conclusions while citing no authority (*id.* at 1134); failing to address federal agency reports supporting the verdict (*id.* at 1135-1136); and disregarding the Circuit's prior rulings in the case (*id.* at 1136). The Second Circuit's decision did not adopt a different "approach" to Rule 50; it simply applied the traditional and accepted approach to the particular case before it.

Finally, even if Anascape were correct that *some* panels had occasionally issued decisions that differ from the analysis of *Brooke Group*, *Matsushita*, and the decisions cited on pages 15-16 above, this Court should await further percolation of the issue *within* the affected circuits, in addition to percolation *among* the circuits. That is particularly the case given that Anascape has not identified any decision acknowledging a supposed conflict. Indeed, Anascape itself did not appear to know of any conflict when it sought rehearing in the Federal Circuit four months ago.

III. Anascape's Remaining Arguments Provide No Basis For Certiorari

The remaining arguments Anascape asserts in its petition fail.

First, nothing in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), altered the accepted

understanding of Rule 50, much less overruled this Court's application of it in *Matsushita* and *Brooke Group*. In *Reeves*, this Court reversed a court of appeals decision holding that an employment discrimination plaintiff who proved a prima facie case of discrimination and convincingly rebutted the employer's proffered nondiscriminatory explanation could nonetheless *never* reach the jury without proffering additional evidence. *Id.* at 146. The Court made clear, however, that judgment as a matter of law might *sometimes* be appropriate in such cases: "To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50[.]" *Id.* at 148. The Federal Circuit's consideration of the record as a whole—including the "objective content" of the key patent documents (Pet. App. 14)—was fully consistent with *Reeves*. *See* 530 U.S. at 148-149 (stating that the appropriateness of judgment as a matter of law "will depend on a number of factors," including "the probative value" of the plaintiff's evidence). If anything, it is Anascape's suggestion that expert evidence should be treated differently from other evidence for purposes of a Rule 50 motion that runs counter to *Reeves*.[7]

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[7] The abuse-of-discretion standard of review for admissibility decisions, *see General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997), is irrelevant to this case. The Federal Circuit did not rule that Dr. Howe's testimony was inadmissible or, in Anascape's words, should have been "excised." Pet. 19. Anascape elsewhere recognizes as much. *Id.* at 8. Rather, the Federal Circuit simply ruled that the evidence of record, taken as a whole *including* Dr. Howe's testimony, did not permit a reasonable jury to find that the '525 patent sufficiently described the invention claimed in the '700 patent.

Second, Anascape's complaint of an "unfair ambush on appeal" (Pet. 20) is meritless. Nintendo repeatedly argued to the district court that the '525 and '700 patent specifications permitted only one reasonable outcome, namely that the disclosure in the earlier patent did not support the claims of the later patent. *See supra* pp. 7-8. Anascape was "on notice every step of the way" that Nintendo was challenging the sufficiency of its evidence, yet it "made no attempt to add or substitute other evidence." *Weisgram*, 528 U.S. at 456. Anascape's claim that the Federal Circuit denied it "any opportunity to lay a better foundation" for Dr. Howe's testimony (Pet. 21) rings hollow, given that it could have sought a new trial in its petition for rehearing, but did not. *See Weisgram*, 528 U.S. at 454-455 & n.11. Even in its petition for certiorari, Anascape still does not explain what "better foundation" it could have provided.

Third, nothing in the Federal Circuit's ruling turns expert testimony into "'second-class' evidence" for Rule 50 purposes. Pet. 23. The Federal Circuit approached the record in the same way as this Court has, namely by ruling that judgment as a matter of law was warranted because Anascape, "in the appellate court's judgment, failed to present sufficient evidence." *Weisgram*, 528 U.S. at 454. The Federal Circuit did not say that expert testimony, once admitted, can *never* provide substantial support for a jury verdict, or that expert testimony deserved less regard under Rule 50 than other evidence. The fact that expert testimony must satisfy "additional threshold requirements" under *Daubert* (Pet. 23) is a consequence of Federal Rule of Evidence 702; it is not a reason to exempt expert testimony from the ordinary operation of Rule 50. Indeed, it is Anascape that seeks to *elevate* its expert's testi-

mony into a kind of "upper-class evidence" that, once admitted, will *always* support a jury verdict in its proponent's favor, even if it is otherwise unsupported or contradicted by the "objective content" of governing documents. Pet. App. 14. Just as there was no reason to "insulate an entire category of employment discrimination cases from review under Rule 50" (*Reeves*, 530 U.S. at 148), there is no reason to do so for patent cases involving expert testimony.

Fourth, there was no "manifest error" here. Pet. 18, 24. Even as Anascape faults the Federal Circuit for rejecting its expert's conclusion, it does not deny that Dr. Howe (1) failed to account for the numerous references to "single input member" present in the '525 patent but removed from the '700 patent; (2) did not address the '525 patent's disparagement of the Chang reference, which used multiple input members; and (3) admitted that the '525 patent did not disclose a device with three input members that together provided movement in six DOF, whereas the '700 patent claimed just that. *See supra* p. 7. The Federal Circuit did not err, much less commit "manifest error," in concluding that Dr. Howe's testimony was inconsistent with the "objective content" of the patents, and that the patents must prevail in such a conflict. Pet. App. 14; *see Brooke Group*, 509 U.S. at 242 ("[W]hen indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

The testimony of an expert skilled in the art is certainly "relevant" to the question of priority date. Pet. 24. The testimony of *this* expert, however, was unsupported and contradicted by the central objective evidence in the case. The Federal Circuit did nothing more than engage in a factbound application of settled

Rule 50 doctrine. Anascape's dissatisfaction with the outcome does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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